85-336

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. _____

Supreme Court, U.S.
FILED
AUG 3 1985
JOSEPH F. SPANIOL, JR.
CLERK

WILLIAM L. EUBANKS, JR., Petitioner,

v.

RICHARD F. O'BRIEN and ECON-O-PLACER, INC.,
a Colorado corporation, Respondents.

PETITION FOR WRIT OF CERTIORARI

James D. Evans, Esq. #9705
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QUESTION PRESENTED:

Does the exercise of in-personam jurisdiction over a nonresident, natural person violate his due process right under Amendment 14 of the Constitution of the United States when his only contact with the forum arises from his having been served with process while being transiently present within that forum?

PARTIES:

Petitioner: William L. Eubanks, Jr.
Kemco Chemicals Co.
313 Lilac Street
P.O. Box 8705
Houston, Texas 77249

Respondents: Richard F. O'Brien
640 W. Tennessee Avenue
Denver, Colorado 80223

Econ-o-Placer, Inc.
640 W. Tennessee Avenue
Denver, Colorado 80223

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985
No. _____

WILLIAM L. EUBANKS, JR., Petitioner,

v.

RICHARD F. O'BRIEN and ECON-O-PLACER, INC., a Colorado corporation, Respondents.

ON WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

William L. Eubanks, Jr., the petitioner herein, prays that a Writ of Certiorari issue to reverse the order and judgment of the Colorado Court of Appeals entered in the above-entitled case on December 27, 1984.

I. Opinions Below

The order of the Colorado Supreme Court denying Eubanks' Petition for Certiorari will be reported, but does not yet appear, in the Pacific Reporter. It is printed, however, in Appendix A hereto, infra, at page A1-2. The opinion of the Colorado Court of Appeals is reported as O'Brien v. Eubanks, 701 P.2d 614. This is also printed in Appendix A hereto, infra, at pages A3-10. The orders of the District Court in and for the City and County of Denver, Colorado are not reported but are printed in Appendix A hereto, infra, at pages A11-14.

II. Jurisdiction

The judgment by default was entered by the trial court on September 9, 1983, (Appendix A, page A11-13). A timely appeal was made to the Colorado Court of Appeals which affirmed the judgment on December 27, 1984, (Appendix A, page A4-10); rehearing by the Court of Appeals was denied on January 24, 1985, (Appendix A, page A3). The Colorado Supreme Court denied, on May 6, 1985, the Petition for Certiorari

filed by William L. Eubanks, Jr. (Appendix A, page A1-2).

The jurisdiction of the U.S. Supreme Court is invoked under 28 U.S.C., §1257(3).

III. Constitutional Provisions Involved

United States Constitution, Amendment XIV

> " Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

IV. STATEMENT OF THE CASE.

A. Procedural Summary

Respondents filed their complaint against William L. Eubanks, Jr. ("Eubanks") and Kemco Industries, Inc. ("Kemco") January 13, 1983 in Colorado state court. Eubanks was personally served in Colorado on January 12, 1983 on behalf of himself and Kemco as its president. Eubanks and Kemco did not file a timely answer, and a technical default was entered against them

pursuant to Colorado Rules of Civil Procedure ("C.R.C.P."), Rule 55(a). Eubanks and Kemco filed a special appearance on May 16, 1983 and thereafter a combined motion to set aside the default, to quash service of process and to dismiss. Said motion was denied. On motion of respondents the trial court entered judgment by default pursuant to C.R.C.P. 55(b)(2). Eubanks and Kemco then filed their notice of appeal to the Colorado Court of Appeals. That court vacated the default judgment against Kemco for reason of lack of sufficient minimum contacts to subject it to personal jurisdiction within Colorado. However, the Court of Appeals affirmed the judgment against Eubanks by finding that Eubanks' physical presence alone subjected him to the state's jurisdiction and, therefore, upheld the judgment against him. Eubanks filed a petition for rehearing in the Court of Appeals. His petition for rehearing was denied. Eubanks then filed his Petition for Writ of Certiorari in the Colorado Supreme Court. Said petition was denied on May 6, 1985.

B. Summary of Facts

On January 13, 1981 Eubanks and Kemco, as sellers, and O'Brien, as purchaser, entered into a written agreement for the purchase and sale of a business in Houston, Texas called Kemco Concrete Pumping Services, Inc., a wholly owned subsidiary of Kemco. Both companies are Texas corporations. Eubanks, a resident of Texas, is the majority shareholder of Kemco and president of both companies. Both Respondents are residents of Colorado.

Pursuant to the aforesaid agreement, O'Brien was to purchase the assets and equipment of Kemco Concrete Pumping Services, Inc. (which equipment was then titled in Econ-o-Placer's name). O'Brien was also to take over all existing contracts, customer lists, referrals and inquiries concerning the concrete pumping business. The parties further agreed that all existing employees of Kemco Concrete Pumping Services, Inc. would remain and become the employees of O'Brien. Eubanks and Kemco also agreed to lease to O'Brien the building and

facilities used by Kemco Concrete Pumping Services, Inc. In addition, they agreed to thereafter not compete with O'Brien for five (5) years within a 250 mile radius of the Houston operation.

The contract price for the sale was $270,000.00. O'Brien gave Kemco his promissory note for $220,013.64 as partial payment. Said promissory note provided for installment payments to be made each month in the amount of $6,111.49.

When O'Brien failed to make the agreed payments, Eubanks and Kemco repossessed some of the equipment which had been sold to O'Brien. Eubanks and Kemco also filed suit on September 29, 1982 in state court in Texas for nonpayment of the money which was due.

Respondents thereafter commenced an action against Kemco and Eubanks in Colorado.

V. REASONS FOR GRANTING WRIT

Eubanks argues that the assertion of personal jurisdiction over him is a violation of his right to due process as guaranteed by the

United States Constitution. U.S.C. Const. Amend. 14.

Certiorari should be granted because the facts of this case clearly present this court with the opportunity to extend the holding in Shaffer v. Heitner, 433 U.S. 186 (1977) and thereby establish a more modern, rational and fair approach for determining if a person should be subject to a court's jurisdiction. The issue presented has never been squarely decided by any previous decision of this court.

Eubanks is appealing the decision of the Colorado Court of Appeals which held that personal service over Eubanks, pursuant to C.R.C.P. 4(e)(1), conferred jurisdiction over him. (Appendix A, page A6.) The Court of Appeals relied upon Pennoyer v. Neff, 95 U.S. 714 (1878) in its decision and rejected the minimum contact analysis urged by Eubanks. (Appendix A, page A5.)

However, the rule which was relied upon by the Colorado Court of Appeals in Pennoyer v. Neff is not determinative of the question presented for two reasons. First, the facts in

the two cases differ sharply. Secondly, the rule relied upon in Pennoyer is only dicta.

The facts in Pennoyer involved a statute which conferred personal jurisdiction upon a nonresident defendant of the forum state through the publication and mailing of a copy of the summons to the defendant. The statute provided that a judgment and execution could be obtained by using such a proceeding. Jurisdiction over the defendant, Neff, was obtained pursuant to said statute, and his property was executed upon and sold.

The dicta in Pennoyer pronounced that a person who is present within the forum is subject to its power and jurisdiction. 95 U.S. at 720. This rule has come to be known as the "presence-power doctrine" or "transient theory of in-personam jurisdiction".

Colorado, and other jurisdictions, have followed the dicta of Pennoyer by custom.

Only one state has squarely decided the same issue presented in this case. Humphrey v. Langford, 246 Ga. 732, 273 S.E.2d 22 (1980).

Eubanks argues that this court should now require a "minimum contacts" approach to personal jurisdiction, as was initially set out in International Shoe v. Washington, 326 U.S. 310 (1945), and apply that rule in cases where a nonresident, natural person is served with process while being transiently present within the forum.

This "minimum contacts" standard was more recently applied in Shaffer v. Heitner, 433 U.S. 186, (1977), in which this court stated that:

> "**All assertions of state court jurisdiction** must be evaluated according to the [fairness and reasonableness] standards set forth in International Shoe and its progeny." Shaffer v. Heitner, 433 U.S. 186, 212 (1977). (Emphasis added; footnote omitted.)

In Shaffer there was a challenge to an assertion of quasi-in-rem jurisdiction. The jurisdictional basis for the claim against the nonresident defendant in Shaffer was the sequestration of stock owned by the defendant in a corporation organized in the forum state. The complaint's cause of action, however, was unrelated to that stock, or even to the forum

state. Id at 189-192. This court held that the mere presence of the property in the forum was insufficient to permit the assertion of quasi-in-rem jurisdiction over a claim unrelated to the forum. Id at 209. Reversing the state courts, this court held that the lower courts erroneously assumed "the continued soundness of the conceptual structure founded on the century-old case of Pennoyer v. Neff." 433 U.S. at 195-96.

> "The fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of property supports an ancient forum without substantial modern justification. Its continued acceptance would serve only to allow state-court jurisdiction that is fundamentally unfair to the defendant." Id at 212.

In Shaffer v. Heitner, the single factor of the physical presence of property within the forum state was no longer a sufficient basis for the exercise of a state's jurisdictional power over a nonresident defendant. Id., 433 U.S. at 209. Rather, what was required was a nexus between the defendant, the controversy and the forum. Id at 209. The rationale applied in Shaffer cuts sharply against the dicta in

Pennoyer which stated that every state possessed exclusive power to assert jurisdiction over property within its borders, 95 U.S. at 720, and it cast a grave doubt over the continuing validity of a state's power to assert jurisdiction over t ansients within its borders, at least without other contacts.

It might be asserted that a non-resident visitor knowingly assumes the risk that the state will exercise its power over him and subject him to its jurisdiction for a cause of action unrelated to the visit. However, such a statement is merely a bootstrap argument which lacks any concept of fairness. A visitor could anticipate such a risk only if he was knowledgeable of the transient theory of in personam jurisdiction. Such an assumption would be neither fair nor reasonable. "While domicile may carry with it anticipation of suit (in the domicile regardless of the underlying claim), it is less likely that transient presence carries with it anticipation of litigation on matters unrelated to the presence." Vernon, Single Factor Basis of In

Personam Jurisdiction - A Speculation of the Impact of Shaffer v. Heitner, 1978 Wash. U.L.Q. 273 at 302-03 (1978).

Those opposing the abolition of the presence-power rule contend that there will be a loss of certainty as to whether service would be effected and, hence, increase the cost and complexity of litigation.

In reply, the proponents contend "the cost of simplifying litigation by avoiding the jurisdictional question may be the sacrifice of 'fair play and substantial justice'. That cost is too high." Shaffer v. Heitner, 433 U.S. at 211. The proponents further contend that the additional advantages of the abolition of the presence-power rule would be: (1) eliminating the likelihood of the misapplication of foreign law; (2) eliminating inconvenient forums and resorting to forum non conveniens; and (3) decreasing the likelihood that a plaintiff would coerce settlements by suing in an inconvenient forum. See, e.g., Posnak, A Uniform Approach to Judicial Administration After World-

Wide and the Abolition of the "Gotcha" Theory; 30 Emory C.J. 729 (1981); Clermont, Restating Territorial Jurisdiction and Venue for State and Federal Courts, 66 Cornell L.Rev. 411, 423 (1981); Bernstine, Shaffer v. Heitner: A Death Warrant for the Transient Rule of In Personam Jurisdiction? 25 Vill.L.Rev. 38 (1979); Ehrenzweig, The Transient Rule of Personal Jurisdiction: the "Power" Myth and Forum Conveniens, 65 Yale L.J. 289 (1956). These commentators, and others, are unanimous in their call for the abolition of the transient rule of in-personam jurisdiction. Ripple, World-Wide Volkswagen Corp. v. Woodson: Reflections on the Road Ahead, 56 Notre Dame Law 65 (1980); Lacy Personal Jurisdiction and Service of Summons After Shaffer v. Heitner, 57 Or.L.Rev. 505 (1978); Sedler, Judicial Jurisdiction and Choice of Law: The Consequences of Schaffer v. Heitner, 63 Iowa L.Rev. 1031 (1978); A.L.I., Restatement (Second) of Judgements §8, Comment A, at 63-64 (Tent. draft No. 5, 1978); Silberman, Shaffer v. Heitner: The End of An Era, 53 N.Y.U.L.Rev. 33

(1978); Vernon, State-Court Jurisdiction: A Preliminary Inquiry into the Impact of Shaffer v. Heitner, 63 Iowa L.Rev. 997 (1978); Karst, The Supreme Court 1976 Term, 91 Harv.L.Rev. 70, 1152 (1977); Casad, Shaffer v. Heitner, An End to Ambivolence in Jurisdiction Theory?, 26 Kan.L.Rev. 61 (1977).

The initial rationale behind the presence-power doctrine was to prevent the possibility of a plaintiff being deprived of a local forum in which to bring suit. However, with the advent of long-arm statutes, a plaintiff still has the opportunity to litigate in a local forum; however, this opportunity should be balanced against fairness and due process accorded to a defendant.

Furthermore, in the past, courts have had no difficulty in utilizing the same minimum contacts approach in determining jurisdiction when service occurs outside the forum state under long-arm statutes. Calder v. Jones, __ U.S. ___; 104 S.Ct. 1482 (1984); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); Rush v.

Savchuk, 444 U.S. 320 (1980); Kulko v. Superior Court of California, 436 U.S. 84 (1978).

In the action commenced by Eubanks against O'Brien in Texas, O'Brien was found to be subject to the jurisdiction of the Texas state court by virtue of the Texas long-arm statute. (Record on Appeal, p. 31; Brief of Plaintiffs-Appellees O'Brien and Econ-o-Placer, p. 3.)

In the present case, neither the claim asserted nor the defendant Eubanks had any contacts or connection with Colorado. In addition, all of the transactions concerning the claims between Eubanks and O'Brien occurred in Texas such as: the negotiation and consummation of the sale of the Concrete Pumping Services, Inc.; the payments to be made by O'Brien were to be made there; the business acquired by O'Brien was located and operated in Texas; the repossession of the equipment took place there; Eubanks, Kemco and Kemco Concrete Pumping Services, Inc. were all Texas residents. Furthermore, there was a total absence of any contacts by Eubanks or Kemco with Colorado. It

was for this reason that the judgment against Kemco was vacated by the Colorado Court of Appeals. (Appendix A, p. A10.)

While Eubanks' act of entering the state might have been a purposeful availment of the jurisdiction of Colorado courts for any claim which might have arisen from his acts within Colorado, it is not a purposeful availment of jurisdiction to claims which arose and occurred prior to that time in another state. Eubanks might have subjected himself to the jurisdiction of the Colorado courts if he had entered into the contract in Colorado. However, such was not the case.

The framers of the Constitution and the framers of the Fourteenth Amendment did not intend for a state with no connection to a controversy to render a judgment in that controversy. World Wide Volkswagen v. Woodson, 444 U.S. at 292-293.

Furthermore, since the burden on Eubanks of having to transport all of his witnesses and evidence to Colorado would be great, Colorado

should not be the forum in which to litigate a controversy with which it has no connection. World-Wide Volkswagen v. Woodson, Id.

Respondents could presumably prosecute their claim through the action which had been previously commenced by Eubanks and Kemco in Texas. The judicial system would thereby be most efficiently served by litigating all the issues arising out of this controversy in one place and at one time. Kulko v. California Superior Court, 436 U.S. at 92-93; c.f., McCabe v. Kevin Jenkins & Assoc., Inc. 531 F.Supp. 648, 651 (D.C. Pa. 1983) (Interest of forum state in adjudicating dispute within its own borders must be balanced against competing interests such as interest of defendant's own state in protecting its own citizens from distant, possibly harassing litigation). Matters should be tried in a manner which would secure the just, speedy, convenient and efficient resolution of the controversy. World Wide v. Volkswagen, 444 U.S. at 292.

In addition, miscarriages of justice are more likely in a forum which has no relation to the law to be applied and to the underlying claim.

The 106-year-old rule of Pennoyer has outlived its usefulness and should give way to a more modern approach to jurisdiction.

Furthermore, it is not logical or consistent with fairness or equality of justice to deny jurisdiction in cases where a defendant has property in the forum (as in the Shaffer case) or where a nonresident corporation with no contacts with the forum is served within the forum state (as in Kemco's case), on the one hand, while upholding jurisdiction (as in the within case) when a natural person was served with process while fortuitously present in Colorado, on the other hand, especially when in all of the cases the claim was unrelated to the forum.

The transient rule of in-personam jurisdiction, if it ever really existed, should be abolished due to the fundamental unfairness which results when a defendant must defend in a

forum completely unrelated to the cause of action and where there is a total absence of any purposeful minimum contact between the defendant and the forum.

Conclusion

For the above reasons, Petitioner prays that this court grant Petitioner his Petition for Writ for Certiorari.

Dated this 1st day of August, 1985.

Respectfully submitted for consideration,

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APPENDIX A

	Pages
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SUPREME COURT, STATE OF COLORADO
Case No. 85SC65
CERTIORARI TO THE COLORADO COURT OF APPEALS;
No. 83CA1172

ORDER OF COURT

WILLIAM L. EUBANKS, JR., and KEMCO INDUSTRIES, INC., a Texas corporation,

Petitioners,

vs.

RICHARD F. O'BRIEN and ECON-O-PLACER, INC., a Colorado corporation,

Respondents.

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review of the record, the briefs, and the opinion of said Court of Appeals,

It Is This Day Ordered that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, MAY 6, 1985.

cc: Gary Sonke, Clerk
Colorado Court of Appeals

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Honorable Gilbert A. Alexander
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IN THE COURT OF APPEALS OF THE STATE OF COLORADO

Case Number 83CA1172

Tr. Court No. 83CV377

RICHARD F. O'BRIEN, et al., Plaintiffs-Appellees,	)	
vs	)	ORDER
WILLIAM L. EUBANKS, JR., et al, Defendants-Appellants.	)	

Upon consideration of the Petition for Rehearing filed by the Appellant herein, said Petition is hereby DENIED. It is ordered that issuance of the Mandate hereby be, and the same hereby is, stayed to and including 2-25-85, provided that if Petition for Writ of Certiorari is timely filed with the Supreme Court of the State of Colorado, the stay shall remain in effect until disposition of the within cause by the Supreme Court.

Sternberg, J.

Enoch, C.J.

Kelly, J.

DATED: 1-24-85

COLORADO COURT OF APPEALS
No. 83CA1172

RICHARD E. O'BRIEN and ECON-O-PLACER, INC., a Colorado corporation,

Plaintiffs-Appellees,

v.

WILLIAM L. EUBANKS, JR., individually, and KEMCO INDUSTRIES, INC., a Texas corporation,

Defendants-Appellants.

Appeal from the District Court of the City and County of Denver

Honorable Gilbert A. Alexander, Judge

DIVISION II JUDGMENT AFFIRMED IN PART, REVERSED IN PART, AND CAUSE REMANDED WITH DIRECTIONS

Opinion by
JUDGE STERNBERG
Enoch, C.J. and
Kelly, J., concur

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Attorney for Defendants-Appellants

Dated December 27, 1984

The defendants, William Eubanks, individually, and Kemco Industries, Inc., a Texas Corp. of which Eubanks is president, appeal from the trial court's entry of default judgment against them, and its denial of their motions to vacate that judgment. Each defendant contends that the judgment should be vacated because the court lacked personal jurisdiction, and because the case should have been dismissed under the doctrine of forum non conveniens. We affirm as to defendant Eubanks, individually, and reverse as to Kemco.

The plaintiffs filed an action in Colorado against defendants Eubanks and Kemco. There was a pending action in Texas between the parties to this suit. Eubanks was in Colorado on vacation, when, on January 12, 1983, he was personally served both for himself and for Kemco, pursuant to C.R.C.P. 4(e)(1) and 4(e)(5). No answer to the complaint and summons was filed by either defendant.

Subsequently, on February 7, 1983, the court ordered entry of default against them. Prior

to entry of judgment of default, defendants entered a special appearance to challenge jurisdiction, and on May 31, 1983, they filed a motion to set aside the default. That motion was denied on June 28, 1983, default judgment was entered on September 9, 1983, and this appeal followed.

Eubanks contends that he was not properly subject to the court's jurisdiction, despite the personal service upon him in Colorado, because he does not have the requisite minimum contacts with the state. We disagree.

Where, as in this case, service is made upon a natural person found within the state, the minimum contacts analysis is inapplicable. See International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945). In this circumstance, the general rule remains that personal service upon someone within the state confers jurisdiction. Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed. 565 (1877); Ruggieri v. General Well Service, Inc., 535 F. Supp. 535 (D. Colo. 1982). Hence, because Eubanks was properly

served according to the process prescribed by C.R.C.P. 4(e)(1), but did not file an answer asserting any defenses as required by C.R.C.P. 12(a) and (b), default judgment was properly entered against him. C.R.C.P. 55(a).

We also disagree with Eubank's contention that the trial court erred in entering the default judgment and in denying his motion to set aside the default judgment. The statutory standards for setting aside a default judgment are specified in C.R.C.P. 55(c), i.e., "for good cause shown" and C.R.C.P. 60(b), i.e., "for mistake, inadvertence, surprise, or excusable neglect."

Here, Eubanks has not alleged or offered proof of any defenses to the action, or shown good cause for his failure to file a timely response. Instead, he depends on his contentions that the trial court lacked jurisdiction over him, or should have dismissed because of forum non conveniens. We have concluded that the court did have jurisdiction over Eubanks, and we discern no abuse of discretion in the court's

failure to dismiss under the doctrine of forum non conveniens. See McDonnell-Douglas Corp. v. Lohn, 192 Colo. 200, 557 P.2d 373 (1976).

Although Eubanks was not notified of the motion for entry of default judgment in accordance with C.R.C.P. 55(b)(2), we do not set aside the default judgment. He was notified in writing of both the motion for entry of default judgment and the damages requested, despite his statement that his only interest in the case was that he have notice so he could file a timely appeal. He admitted he had actual notice of the hearing but chose not to appear and defend. Cf. Bernhagen v. Burton, _____ P.2d _____ (Colo. App. No. 83CA1409, December 27, 1984) (default judgment set aside where defendant had no notice of the entry of default). Under these circumstances, where defendant has actual notice and has indicated his intention not to appear and defend, the lack of technical compliance with the requirements of the rule does not mandate setting aside the default judgment. See Civil Service Commission v. Doyle, 162 Colo. 1, 424 P.2d

368 (1967); but cf. R.F. v. D.G.W., 192 Colo. 528, 560 P.2d 837 (1977).

Therefore, because Eubanks was properly before the court, and offered no showing of excuse of good cause sufficient to justify setting aside the judgment, we find no abuse of discretion in the trial court's refusal to grant Eubanks his requested relief.

However, we agree with defendant Kemco that service of process on Eubanks as its president was insufficient to give Colorado jurisdiction. Eubanks was not in Colorado to do business for the company. Because there were no other contacts between Kemco and Colorado, the transitory and non-business related presence of its president could not support finding the corporation's presence within the state to be sufficient to confer jurisdiction under C.R.C.P. 4(e)(5). See Begole Aircraft Supplies, Inc. v. Pacific Airmotive Corp., 121 Colo. 88, 212 P.2d 860 (1959); compare White-Rodgers Co. v. District Court, 160 Colo. 491, 418 P.2d 527 (1966) (service upon an agent of a foreign corporation which

regularly and systematically does business in the state is sufficient to confer jurisdiction); with Van Schaack & Co. v. District Court, 189 Colo. 145, 538 P.2d 425 (1975) (a single transaction of business within the state was sufficient to satisfy minimum requirements for in personam jurisdiction so long as the action was based on a contract which had a substantial connection with that state).

Because a judgment rendered without jurisdiction over the party is void, Whitten v. Coit, 153 Colo. 157, 385 P.2d 131 (1963), the default judgment against Kemco must be vacated. Weaver Construction Co. v. District Court, supra.

The judgment is affirmed as to Eubanks and is reversed as to Kemco Industries, Inc., and the cause is remanded to the district court with directions to vacate the default judgment against Kemco Industries, Inc.

CHIEF JUDGE ENOCH and JUDGE KELLY concur.

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO

Civil Action No. 83CV377, Division 8

ORDER

RICHARD E. O'BRIEN and ECON-O-PLACER, INC., Plaintiffs,

vs.

WILLIAM L. EUBANKS, JR., individually, and KEMCO INDUSTRIES, a Texas corporation,

Defendants.

THIS MATTER coming on to be heard this 9th day of September, 1983, upon Plaintiffs's Motion for Default Judgment, and the Court having examined said Motion, the file in this matter, and the Affidavit of Richard E. O'Brien, and being fully advised in the premises,

DOTH FIND AS FOLLOWS:

1. Defendant William L. Eubanks, Jr. was duly served pursuant to the Colorado Rules of Civil Procedure by serving a true and correct copy of the Summons, together with a true and correct copy of the Complaint, upon him

personally on January 12, 1983, at 672 Cramner, Unit #113, Grand County, Colorado.

2. Defendant Kemco Industries, Inc. was duly served pursuant to the Colorado Rules of Civil Procedure by serving a true and correct copy of the Summons, together with a true and correct copy of the Complaint, upon William L. Eubanks, Jr., President of Kemco Industries, Inc., on January 12, 1983, at 672 Cramner, Unit #113, Grand County, Colorado.

3. More than twenty (20) days have elapsed since said service.

4. Defendants William L. Eubanks, Jr., individually, and Kemco Industries, Inc. have failed to plead or otherwise answer.

5. Venue for the within action is proper for the District Court for the City and County of Denver, Colorado, in that Defendants are nonresidents of the State of Colorado, and Denver County was designated in the Complaint, in accordance with the requirements of C.R.C.P. 98(c)(1); and the Affidavit of Indebtedness attached to the Motion for Default

Commission to overcome the applicaton to him of the RICO guideline of additional time.

The discretion of the Parole Commission seems to be no discretion at all. In order to determine how really flexible the Parole Commission was, the Third Circuit Court of Appeals directed United States District Judge Richard C. Conaboy (USDC Middle Dist. Pa.) (*US ex rel. Forman v. McCall,* 709 F.2d 852 [1983]) to conduct a hearing and make findings as to the role of discretion in decision making by the Parole Commission under its guidelines.

In order to comply, Judge Conaboy conducted conferences, received extensive expert reports and opposing briefs, and held a hearing at which experts testified in support of opposing positions.

Contrary to the arguments of the respondents in that case, that the guidelines are merely rules that govern their methods rather than bind their determination, he found (memorandum and order, Civil No. 81-0553, D.C., Middle Dist. Pa., Sept. 14, 1984), that the Commission rarely departed from the Guidelines.

> "Having reached these clear and concise factual findings from the vast amount of information provided by the parties, we must now apply them to the mandates of the Appellate Court's Order. *United States ex rel. Forman v. McCall,* 709 F. 2d 852 (1983). In doing so, we find that the guidelines are woodenly applied, thus constituting an 'unyielding conduit', *Id.* at 863, void of 'substantial flexibility'. *Id.* at 862.
>
> Having reached the conclusion that the Parole Commisson Guidelines are not applied in a discretionary fashion nor with 'substantial flexibility' we

> must conclude, as a finding of fact, that the Parole Commission Guidelines constitute 'laws' within the meaning of the ex post facto clause."

In commenting upon *Weaver v. Graham,* the United States Court of Appeals for the Third Circuit noted in *United States v. Ferri,* 625 F.2d 325, 327, 328 (1981):

> "The net effect of Weaver, as applied here, would appear to render violative of the ex post facto clause a statute which operates retrospectively and which significantly diminishes a prisoner's opportunity to reduce his period of incarceration and thereby increases his punishment.
>
> The reasoning of the Supreme Court in *Weaver v. Graham* would appear to strengthen the views expressed by this Court in *Geraghty.* We concluded in *Geraghty* that there is a potential violation of the ex post facto clause in the retrospective application of new guidelines promulgated by the United States Parole Commission when they were applied to prisoners who were sentenced prior to enactment of the statute in 1976. This same rationale may apply to Matthew because he was sentenced in 1975."

Neither Congress nor the Parole Commission may create retroactive application of increased punishment.

The regulation passed by the Parole Commission which it calls guidelines was concededly authorized by Congress. What Congress is forbidden to do, it may not authorize others to do. The Parole Commission may not pass an *ex post facto* law, because Congress may not.

Rodriguez v. United States Parole Commission, 594 F.2d 170 (7th Cir. 1979) dealt with the elimination of a hearing which had customarily been held at the one-third

point of a sentence. The court held that the elimination of the one-third hearing, which would have given Rodriguez a meaningful inquiry at the end of eight months and the substitution therefor of a hearing at the end of eighteen additional months, was a violation of the *ex post facto* law prohibition of the Constitution. The court stated (173, 174, 176):

> "The first part of this inquiry, whether the regulation involved here in equivalent to a 'statute' for purposes of the clause, need not detain us long. Where Congress has delegated to an agency the authority to make a rule instead of making the rule itself, the resulting administrative rule is an extension of the statute for purposes of the clause. What Congress cannot do directly, it cannot do by delegation. See, E.G., Geraghty v. United States Parole Commission, 579 F.2d 238, 266 & n. 143 (3d Cir. 1978), cert. granted, ____ U.S. ____, 99 S.Ct.1420, 29 L.Ed. 2d 632 (1979). The Act expressly authorizes the commission to adopt 'rules and regulations as are necessary to carry out a national parole policy.' 18 U.S.C. §4203(a)(1). 'Legislative' rules adopted by the commission pursuant to statutory power have the force and effect of law. See generally *Joseph v. United States Civil Service Commission,* 180 U.S. App. D.C. 281, 295 n. 26, 554 F.2d 1140, 1154, n. 26 (1977); Davis, Administrative Law of the Seventies §5.03 at 147 (1976)."

The Court of Appeals for the Fifth Circuit held in *U.S. ex rel. Graham v. U.S. Parole Commission,* 629 F.2d 1040 (1980) that where a guideline affected a substantive right to parole eligibility it should be treated as a statute would be treated under the restrictions of the *ex post facto* clause. It said (629 F.2d at p. 1043):

> ". . . however, if the statute or the regulations affect a prisoner's substantive right to parole eligibility, neither can be so applied retroactively without violating the ex post facto clause."

The court sent the matter back to the District Court to determine whether the determination of factors for the exercise of the Commission's discretion substantially diminished or eliminated the petitioner's eligibility for parole.

The "woodenly applied" concept of guidelines as found by District Judge Conaboy in *Forman* (*supra*, U.S.D.C. Middle Dist. Pa.) finds justification, and thus statutory status, in the Parole Commission Act itself. In *Allen v. Hadden,* 536 F. Supp. 586, 595 (D.C. Col. 1982), the court explained:

> "Although the commission may make a parole determination outside of the guidelines, see 28 C.P.R. §2.20(c)(d), it must issue a written notice stating its reasons for doing so. 18 U.S.C. §4206(c). It is therefore essential that the commission first follow faithfully its own regulations in applying the guidelines."

The need to follow its own regulations, the genesis of those regulations in the power of Congress and the substantive nature of the increased punishment of the RICO regulation in the case at bar combine to give to the Guidelines in this case the status of a statute which is subject to the *ex post facto* prohibition.

In failing to consider the plea bargain the Court of Appeals rejected the principle that a promise must be fulfilled when it constitutes a part of the inducement or consideration of a plea.

When a plea of innocence is withdrawn and a plea of guilty is entered and accepted by a court on the basis of a promise by the prosecution, that promise must be fulfilled. The rule is founded on constitutional principles and was specifically articulated in *Santobello v. New York*, 404 U.S. 257, 262, 30 L.Ed. 427, 433, 92 S.Ct. 495 (1971), where this Court stated:

> "This phase of the process of criminal justice and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled."

That the principles of *Santobello* have been applied to cases involving parole is illustrated in *Geisser v. U.S.*, 513 F.2d 862 (5th Cir. 1975). That case involved the breach of a plea bargain made with the Department of Justice which promised parole after three years imprisonment. The District Court ordered release of the prisoner and, on appeal, the Department argued that the District Court usurped the exclusive power of the parole board by ordering release. The Court of Appeals, however, concluded that such a bargain "fits well within the realm of enforceable constitutional rights" (513 F.2d at 869 n. 11).

The reality of litigation was reflected in the plea bargain made in this case. If the covenant not to communicate may be disgarded, there was no meaning at all to the covenant. The fact is that after a mistrial the Government was satisfied if it achieved a conviction. The Petitioner at the same time was satisfied with the promise that he would not be held responsible for involvement in a sum greater than $33,000.

The provision in the case at bar, entailing the consideration that no communication to the Parole Commission would deal with a sum in excess of $33,000, had great significance to petitioner and his counsel. The significance arises from the generally accepted view that the Parole Commission is not an investigative agency. It considers information presented to it, but has no function or obligation to seek additional information.

District Judge Egintion in the District Court in Connecticut held in *Iuteri v. Nardoza*, 560 F.S. 745, 753 (1983):

> "This court's conclusion is consistent with the interpretation made by other courts and makes sense in light of the function of the Commission as a record reviewing, not an investigative agency. *Fardella v. Garrison*, 698 F.2d 208 (4th Cir. 1983); *McClanahan v. Mulcrome*, 636 F.2d 1190, 1191 (10th Cir. 1980); *Fox v. United States Parole Commission*, 417 F. Supp. 855 (D. Kan. 1981); see *Iuteri v. Nardoza*, 662 F.2d 159 (2nd Cir. 1981). It considers information presented to is, see 18 U.S.C. §4207 but is under no obligation to seek additional information."

The minutes of the District Court session at which the plea bargain was made (13a) demonstrate that the promise

was made that in no communications to the Parole Commission would there be reference to more than $33,000.

It was appellant's claim that he was never involved in more than $33,000, although the count to which he pleaded made reference to $100,000.

The Parole Commission and the United States Attorney for the Eastern District are both component parts of the Department of Justice. When the appellant made his agreement with the "Government," he was making it with the entire government. Specifically, the spokesman was the Assistant United States Attorney with authority to act for his department.

In a different context, but relevant with regard to the perception of petitioner, is that every department of the panoply of agencies which constitutes the United States of America is subsumed within the concept of "Government."

Thus, in *United States v. Bryant*, 439 F.2d 642, 650 (D.C. Cir. 1971), the court held:

> "The fact that it was the Bureau of Narcotics and Dangerous Drugs, and not the United States Attorney's office, which had possession of the tape in these cases does not render it any less discoverable. The duty of disclosure affects not only the prosecutor, but the Government as a whole, including its investigative agencies."

See also, *United States v. Rosenberg*, 299 F.S. 1241 (S.D. N.Y. 1969) which involved transcripts and conversations with an Internal Revenue Service official on occasions of alleged bribes and *United States v. Mosely*, 266 F.S. 834, (D.D.N.Y. 1967), which dealt with statements to postal inspectors.

CONCLUSION.

The Petition For A Writ Of Certiorari Should Be Granted.

Respectfully submitted,

CHARLES HAYDON
Attorney for Petitioner
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New York, NY 1005-3089
(212) 943-0880

Appendix A—Order and Opinion of the United States Court of Appeals for the Second Circuit, Decided June 13, 1985.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirteenth day of June one thousand nine hundred and eighty-five

Present:

Hon. Wilfred Feinberg,
Chief Judge
Hon. Ellsworth A. Van Garaafeiland,
Hon. Lawrence W. Pierce,
Circuit Judges,

VINCENT DINAPOLI,

Plaintiff-Appellant,

v.

NORTHEAST REGIONAL PAROLE COMMISSION, UNITED STATES PAROLE COMMISSION, DENNIS LUTHER, Warden, Federal Correctional Institution, Danbury, Conn.,; and WILLIAM FRENCH SMITH, Attorney General of United States of America,

Defendants-Appellees.

No. 85-2054

Appeal from the United States District Court for the District of Connecticut

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

ELAINE B. GOLDSMITH
Clerk

By: EDWARD J. GUARDARO
Deputy Clerk

UNITED STATES COURT OF APPEALS,

SECOND CIRCUIT

VINCENT DINAPOLI,

Petitioner-Appellant,

v.

NORTHEAST REGIONAL PAROLE COMMISSION, UNITED STATES PAROLE COMMISSION, DENNIS LUTHER, Warden, Federal Correctional Institution, Danbury, Connecticut, and WILLIAM FRENCH SMITH, Attorney General, Department of Justice,

Respondents-Appellees.

No. 1264, Docket 85-2054

Argued May 20, 1985.

Decided June 13, 1985.

Charles Haydon, New York City (Dublirer, Haydon, Straci & Victor, New York City, of counsel), for petitioner-appellant.

Barry K. Stevens, Asst. U.S. Atty., D. Conn., Bridgeport, Conn. (Alan H. Nevas, U.S. Atty., D. Conn., New Haven, Conn., of counsel), for respondents-appellees.

Before Feinberg, Chief Judge, and Van Graafeiland and Pierce, Circuit Judges.

Feinberg, Chief Judge:

Vincent DiNapoli appeals from an order of the United States District Court for the District of Connecticut, T.F. Gilroy Daly, Chief Judge, denying his petition for a writ of habeas corpus. DiNapoli is currently serving a five-year term of imprisonment, entered in the United States District Court for the Eastern District of New York after his plea of guilty to one count of racketeering in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962(c). DiNapoli offers two grounds for granting the writ. First, he claims that the United States Parole Commission violated the Constitution's prohibition against ex post facto laws, U.S. Const. art. I, § 9, cl. 3, by applying parole guidelines that were not in effect at the time of his offense, plea agreement or sentencing. Second, he contends that his plea agreement was violated by the Parole Commission's consideration of certain information in determining how much time he should serve before release. For the reasons stated below, we affirm the judgment of the district court.

I.

In pleading guilty to engaging in a "pattern of racketeering activity" in violation of RICO, DiNapoli had to, and did, admit to committing two predicate offenses, 18 U.S.C. § 1961(5). The first offense involved actual receipt of approximately $33,000 in return for a promise of "labor peace" at a particular construction site. The second involved an attempt to extort approximately $100,000 in connection with another construction project. The plea agreement entered into by appellant and the government was not reduced to writing. As stated by appellant's counsel at the entry of the plea, the relevant portion of the agreement is as follows:

> Mr. DiNapoli voluntarily said, proposed, authorized to offer that he will return the $33,000 which was involved, to the Government and that the Government in turn is not going to claim in their communications to the Parole Commission as to the part which deals with the amount involved and it will not claim an amount in excess of $33,000, which Mr. DiNapoli has voluntarily agreed to return.

DiNapoli pled guilty on April 16, 1982 and was sentenced on July 19. Apparently due to illness, he did not begin serving his sentence until March 2, 1983. He received his initial parole hearing before an examiner panel of the Parole Commission on August 23, 1983. In a Notice of Action dated September 20, 1983, the Commission concluded that under its existing regulations, 28 C.F.R. § 2.10 *et seq.* (1983)(1983 Guidelines), DiNapoli had an "offense severity rating" of Category Five, *id.* § 2.20, which, when combined with his "salient factor score" of six, indicated a range of incarceration of 36 to 48 months before parole. *Id.*; *see Roth v. United States Parole Comm'n*, 724 F.2d